FILED
AUG 3 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 331 O.T. 1967

AARON L. SIMON,

Petitioner,

against

MAURICE WEINGOLD, Public Administrator, as Administrator of the Goods, Chattels and Credits of MARTIN VAN WYCK, deceased,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent respectfully prays that the petition for a writ of certiorari to review three orders of the United States Court of Appeals for the Second Circuit be denied.

Opinions Below

1. Order of the United States Court of Appeals for the Second Circuit dated and entered April 10, 1967, which unanimously denied appellant's motion for an extension of time in which to docket his appeal.

2. Order of the United States Court of Appeals for the Second Circuit dated and entered April 10, 1967, which unanimously granted appellee's motion to dismiss the appeal.

3. Order of the United States Court of Appeals for the Second Circuit dated and entered April 20, 1967, which unanimously denied appellant's motion to reconsider dismissal of his appeal.

4. Order of the United States Court of Appeals for the Second Circuit dated and entered May 9, 1967, denying appellant's petition for rehearing *in banc*: "No active circuit judge having requested that a vote be taken on the suggestion that the case be reheard *in banc*, the same stands denied."

5. Order of the United States Court of Appeals for the Second Circuit dated and entered on June 12, 1967, which unanimously denied appellant's motion to reinstate his appeal.

Jurisdiction

It is the position of the respondent that the petitioner has failed to demonstrate that the United States Supreme Court should invoke its jurisdiction under Title 28, U.S.C. 1254 (1) to review the foregoing orders numbered 1, 2, and 5, of the United States Court of Appeals for the Second Circuit.

Questions Presented

1. Has the petitioner demonstrated that it is important for the United States Supreme Court to invoke its jurisdiction to review the dismissal by the United States Court of Appeals for the Second Circuit of an appeal from a judgment in a negligence action in which the United States District Court, Eastern District of New York, found that the plaintiff's own negligence contributed to the accident upon which suit was brought and directed entry of judgment in favor of defendant after trial without jury?

2. Has the petitioner demonstrated that the United States Court of Appeals for the Second Circuit abused the discretion conferred upon it by Rule 73 of the Federal Rules of Civil Proccedure, Title 28 U.S.C., and Section 2071, Title 28 U.S.C. in dismissing the petitioner's appeal for failure to file the record and docket his appeal as required by both Rule 73, Title 28 U.S.C. and Rule 14 of the Rules of the Court of Appeals for the Second Circuit, Title 28, U.S.C.?

Statutes Involved

Rule 73 of the Federal Rules of Civil Procedure, Title 28 U.S.C.

(a) How and When Taken. An appeal permitted by law from a district court to a court of appeals shall be taken by filing a notice of appeal with the district court within 30 days from the entry of the judgment appealed from . . .

. . .

Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. If an appeal has not been docketed, the parties, with the approval of the district court, may dismiss the appeal by stipulation, filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant.

. . .

(g) Docketing the Appeal; Filing of the Record on Appeal. The appellant shall cause the record on appeal as provided for in Rules 75 and 76 to be filed with the court of appeals and the appeal to be docket there within 40 days from the date of filing the notice of appeal. The record will be filed and the appeal docketed upon receipt by the clerk of the court of appeals, within the 40 days herein

provided or within such shorter or longer period as the court may prescribe, of the record on appeal and, unless the appellant is authorized to proceed without prepayment of fees, of the docket fee fixed by the Judicial Conference of the United States. When more than one appeal is taken from the same judgment to the same court of appeals, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date of filing the first notice of appeal. In all cases the district court may extend the time for filing the record and docketing the appeal upon motion of an appellant made within the period for filing and docketing as originally prescribed or as extended by a previous order, or upon its own motion by order entered within such period, but the district court shall not extend the time to a day more than 90 days from the date of filing the first notice of appeal. The motion of an appellant for an extension shall show that his inability to effect timely filing and docketing is due to causes beyond his control or to circumstances which may be deemed excusable neglect. The district court or the court of appeals may require the record to be filed and the appeal to be docketed at any time within the time otherwise provided or fixed.

Rules of the Court of Appeals for the Second Circuit, 28 U.S.C.

14. Docketing cases—(a) Time within which record must be filed. In appeals in civil and admiralty cases the appellant shall docket the action and file the record in this court within 40 days after filing the notice of appeal with the district court, or within any added time granted by the district judge within 40 days after the filing of the notice of appeal, but in no case later than 90 days after such filing (Rule 73 (g) of the Federal Rules of Civil Procedure). In an appeal in a criminal case the appellant shall docket the case and file the record within the time

fixed by Rule 39 of the Federal Rules of Criminal Procedure. If the record is not presented to the clerk for filing within the periods above provided, he shall refuse to accept it unless so ordered by this court or a judge thereof if this court is not in session, or an order on consent has been or is being entered as provided in Rule 29 (9).

(b). Motion to file record. This court will not hear and grant motions for filing and docketing appeals, otherwise properly taken, at times other than as stated in subdivision (a) hereof, except upon a showing by affidavits or otherwise as the court may order, (1) that the delay has been due to causes beyond the control of the moving party, or (2) that the delay has been due to circumstances which shall be deemed to be merely excusable neglect on the part of the moving party and there is a substantial question to be presented on appeal, and (3) in all cases where the district court has power to act, that an extension of time has been denied by that court, together with the grounds for such denial, if any are stated.

(c) Dismissal by the clerk. If the appellant shall have failed to comply with this rule, any appellee may either docket the action and file the record in this court, in which event it shall stand for argument, or have the action dismissed by the clerk of this court upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, certifying that such appeal has been duly taken or allowed, and proof that 4 days' notice in writing has been served on the appellant or his attorney that application will be made to the clerk of this court for such dismissal. No action dismissed under this rule shall be reinstated except in the discretion of the court and upon a showing similar to that required under subdivision (b) hereof.

Section 2071, Title 28 U.S.C.

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the

conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court. June 25, 1948, c. 646, 62 Stat. 961; May 24, 1949, c. 139, Section 102, 63 Stat. 104.

Section 4513 of the Civil Practice Law and Rules of New York State, Laws 1962, Chap. 308

"4513. Competency of person convicted of crime.

A person who has been convicted of a crime is a competent witness; but the conviction may be proved for the purpose of affecting the weight of his testimony, either by cross-examination, upon which he shall be required to answer any relevant question, or by the record. The party cross-examining is not concluded by such person's answer."

Statement of the Case

This suit was based on an automobile accident that occurred in June of 1961. The petitioner who was the operator of one of the vehicles involved in the accident commenced suit alleging that the negligence of the defendant's intestate caused the accident. The suit was tried during December of 1966 before the United States District Court, Eastern District of New York, without a jury. That the petitioner had been convicted of a crime was brought out on direct examination by the petitioner's attorney. On cross examination when the petitioner's testimony was vague and indefinite as to the nature of what crimes he had been convicted, the date of such convictions, and the sentences given, certified copies of the convictions were placed in evidence. During the course of the trial, nine witnesses testified and some fifteen exhibits were placed in evidence. After having due deliberation thereon, the trial court found on December 20, 1966, that the negligence of

the petitioner contributed to the accident upon which suit was brought and directed the entry of judgment in favor of the defendant and ordered that the complaint be dismissed. Judgment for the defendant was entered and filed on December 21, 1966.

A notice of appeal dated January 19, 1967, was filed by the petitioner. On April 10, 1967, this matter came before the United States Court of Appeals for the Second Circuit on motion of the petitioner for an extension of time to perfect his appeal and upon the motion of the respondent to dismiss the said appeal for failure to prosecute the appeal as required by the terms of Rule 73 of the Federal Rules of Civil Procedure, Title 28 U.S.C. and Rule 14 of the Rules of the Court of Appeals for the Second Circuit, Title 28 U.S.C. During the course of the arguments on behalf of the respective parties, the United States Court of Appeals for the Second Circuit, Chief Judge Lombard presiding, gave the petitioner's counsel ample opportunity both prior and subsequent to the argument of the counsel for the respondent to demonstrate whether the failure of the petitioner to comply with the foregoing Rules was beyond the control of the petitioner or due to justifiable excuse and whether there was a substantial question presented to make the appeal meritorious. When neither the moving papers nor the oral arguments on behalf of the petitioner set forth facts to establish either that the delay was beyond the control of the petitioner or that there was a substantial question presented to make the appeal meritorious, the United States Court of Appeals for the Second Circuit by orders dated and entered April 10, 1967, unanimously denied petitioner's motion for an extension of time in which to docket his appeal and unanimously granted respondent's motion to dismiss the petitioner's appeal.

On April 18, 1967, the petitioner filed an application to have the United States Court of Appeals for the Second Circuit to reconsider the dismissal of his appeal. By

order dated and entered April 20, 1967, the United States Court of Appeals for the Second Circuit unanimously denied the petitioner's motion to reconsider the dismissal of his appeal.

On April 26, 1967, the petitioner filed a petition to the United States Court of Appeals for the Second Circuit to have the case reheard *in banc.* By order dated and entered May 9, 1967, the United States Court of Appeals for the Second Circuit, by its Chief Judge ruled "No active circuit judge having requested that a vote be taken on the suggestion that the case be reheard *in banc,* the same stands denied".

On May 29, 1967, the petitioner moved to "reinstate the appeal, heretofore dismissed" and the United States Court of Appeals for the Second Circuit unanimously denied the petitioner's motion by order dated and entered on June 12, 1967.

On July 5, 1967, the petitioner served a "Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit". This brief is submitted in opposition to that petition.

POINT I

The petitioner has failed to demonstrate that it is important for the United States Supreme Court to invoke its jurisdiction to review the dismissal by the United States Court of Appeals for the Second Circuit of an appeal from a judgment in a negligence action in which the United States District Court, Eastern District of New York, found that the plaintiff's own negligence contributed to the accident upon which suit was brought and directed entry of judgment in favor of the defendant after trial without a jury.

1. The dismissal of the petitioner's appeal by the United States Court of Appeals for the Second Circuit after he

failed to comply with the requirements of Rule 73, Title 28 U.S.C. and Rule 14 of the Rules of the Court of Appeals for the Second Circuit, Title 28 U.S.C., is not in conflict with the decision of the Supreme Court of the United States in *Pyramid Freight Corporation* v. *Ispass*, 330 U. S. 695, 67 S. Ct. 954 The latter decision is the only decision of the United States Supreme Court cited by the petitioner as being in conflict with the dismissal of his appeal by the United States Court of Appeals for the Second Circuit. Far from there being any conflict, the decision of the Supreme Court in the *Pyramid* case recognized that the United States Court of Appeals for the Second Circuit was specifically empowered by Rule 73, Title 28 U.S.C. to take "such action as the court of appeals deems appropriate, which may include dismissal of the appeal". The United States Supreme Court in that case not only recognized the discretion vested by the said Rule in the United States Court of Appeals for the Second Circuit but refused to interfere with the discretion exercised. In its opinion, the United States Supreme Court, said at page 702:

> "The authority of a Judge of the Circuit Court of Appeals for the Second Circuit to extend the time for filing the record on appeal appears to be supported by Rule 15 of that court. That Rule, however, was not discussed by counsel and we sustain the action taken by the Circuit Court of Appeals under authority of Rule 73(a), even without reference to its own Rule 15. . . ."
>
> "We interpret the statement as no more than a recognition by the court that the substantiality of the question to be at issue on the merits of the appeal was a matter appropriate for its consideration under Rule 73(a) in connection with all the other circumstances before it. Rule 73(a) is intended to place reliance upon the sound discretion of the Circuit Court of Appeals. We see no reason to question the discretion exer-

cised in this case as evidenced by the agreement of all of the five Circuit Judges to whom the issue was presented."

In the case at bar, discretion to dismiss the petitioner's appeal was expressly conferred by Rule 73a of the Federal Rules of Civil Procedure, Title 28 U.S.C. and by Rule 14 of the Rules of the Court of Appeals for the Second Circuit, 28 U.S.C Similarly, after four applications to the United States Court of Appeals for the Second Circuit, no active circuit judge requested a vote be taken on the petitioner's suggestion that the case be reheard *in banc* and each of the petitioner's repeated applications were unanimously denied

2. The dismissal of the petitioner's appeal by the United States Court of Appeals for the Second Circuit after the petitioner failed to comply with the requirements of Rule 73, Title 28 U.S.C. and Rule 14 of the Rules of the Court of Appeals for the Second Circuit, Title 28 U.S.C., is not in conflict with the discretion recognized and applied in the decisions of the various United States Courts of Appeals. The published decisions of the United States Courts of Appeals in which leave to file records or otherwise perfect appeals has been denied and appeals dismissed where the appellants' excuses have been deemed insufficient are very numerous indeed. Among the many such decisions of the various United States Courts of Appeals which are consistent with the action taken in the instant case by the United States Court of Appeals for the Second Circuit are the following cases: *MacNeil Bros. Co.* v. *Forte* (CA 1st), 253 F2nd 500; *Galvin* v. *National Biscuit Co.* (CA 2nd), 177 F2nd 963; *Wendel* v. *Hoffman* (CA 3rd), 104 F2nd 57; *Morrow* v. *Wood* (CA 5th), 126 F2nd 1021; *Lamb* v. *Shasta Oil Co.* (CA 5th), 149 F2nd 729; *Copco Steel & Engineering Co.* v. *Neunkircher Eisenwerk* (CA 6th), 267 F2nd 491; *Mulvaney* v. *Lever Bros. Co.* (CA 6th), 158 F2nd 956; *United States* v. *Schlolfeldt* (CA 7th), 123 F2nd 109;

Plankington Bldg. Co. v. *First Mortgage Bondholders Protective Committee* (CA 7th), 133 F2nd 900; *Gammill* v. *Federal Land Bank of St. Louis* (CA 7th), 129 F2nd 501; *Tucker Products Corporation* v. *Helms* (CA 9th), 171 F2nd 126 certiorari denied 336 US 938 69 S Ct 748; *Spears* v. *Shell Oil Co.* (CA 9th), 249 F2nd 396; *Markham* v. *Kallimanis* (CA 9th), 151 F2nd 145 certiorari denied 327 US 788 S Ct 806; *United States* v. *Krause* (CA 9th), 197 F2nd 329; *United States* v. *Tamotsu Fujisaki* (CA 9th), 198 F2nd 747; *Beecher* v. *Smithson* (CA 9th), 205 F2nd 113; *Baccolla* v. *United States* (CA 5th), 199 F2nd 954; *Brennan* v. *Rock Wool Insulating Co.* (CA 10th), 337 F2nd 849; *Maghan* v. *Young* (CA DC), 154 F2nd 13; *Citizens Protective League Inc.* v. *Clark* (CA DC), 178 F2nd 703; *United States* v. *Bowen* (CA 5th), 310 F2d 45.

3. Dismissal of the petitioners' appeal by the United States Court of Appeals for the Second Circuit after the petitioner had failed to comply with the requirements of Rule 73, Title 28 U.S.C. and Rule 14 of the Rules of the Court of Appeals for the Second Circuit, Title 28 U.S.C., did not deny the petitioner of equal protection of the laws, nor of due process of law. In the "Petition for Writ of Certiorari", it is admitted on page 6 that the petitioner "failed to docket the appeal within the prescribed time". The time is prescribed by Rule 73 of the Federal Rules of Civil Procedure, Title 28 U.S.C. The said Rule 73 also authorized the United States Court of Appeals to take such action "which may include dismissal of the appeal", for failure to perfect the appeal in accordance with the Rule. No claim has been supported nor has any authority been cited that the said Rule 73 denies an appellant of due process of law or equal protection of the law. Similarly, Section 2071 of Title 28 U.S.C. empowers the United States Courts to prescribe rules for the conduct of their business. Rule 14 of the Rules of the United States Court of Appeals for the Second Circuit Title 28 U.S.C. provides that where an

appellant has failed to docket the action and file the record in the time prescribed, "this Court will not hear and grant motions for filing and docketing appeals . . . except upon a showing by affidavit or otherwise as the court may order (1) that the delay has been due to causes beyond the control of the moving party or (2) that the delay has been due to circumstances which shall be deemed to be merely excusable neglect on the part of the moving party and there is a substantial question to be presented on appeal. . . ." The power of the United States Courts under the foregoing Rules and under Section 2071 of Title 28 U.S.C. to prescribe and enforce rules in the conduct of their business cannot be seriously questioned.

Where an appellant fails to comply with the requirements of the foregoing Rules, he cannot be heard to contend that he has been deprived of equal protection of the laws or of due process of law. That is particularly true in the instant case where the petitioner has failed in his repeated applications to the United States Court of Appeals to establish either that his failure to comply with the foregoing Rules was due to causes beyond his control or was due to justifiable excuse and that there was a substantial question presented which would make his appeal meritorious. The suggestion now made for the first time on page 16, Paragraph 7 of the Petition for Writ of Certiorari that the petitioner did not comply with the foregoing Rules because he did not anticipate that the United States Court of Appeals for the Second Circuit would enforce the said Rules is both without merit and without substance. Clearly, such a suggestion does not constitute a cause beyond the control of the petitioner.

4. The failure of the petitioner to comply with the requirements of Rule 73, Title 28 U.S.C., and Rule 14 of the Rules of the Court of Appeals for the Second Circuit Title 28 U.S.C., does not constitute a case of general im-

portance requiring the United States Supreme Court to invoke its jurisdiction to review the matter. The dismissal of the petitioner's appeal turned upon the special facts and particular circumstances under which the United States Court of Appeals for the Second Circuit determined that the petitioner did not demonstrate that his failure to comply with the foregoing rules was due to causes beyond his control or that his appeal presented a substantial question. This suit was based on alleged negligence in the operation of a motor vehicle. After hearing and observing some nine witnesses and examining some fifteen exhibits, the United States District Court, Eastern District of New York, which tried the suit without jury, found that the plaintiff's own negligence played a substantial part in causing the accident and directed the entry of judgment in favor of the defendant. The findings and judgment of the United States District Court, Eastern District of New York are based upon the particular facts and circumstances pertaining to the specific accident between the parties and do not constitute a matter of general significance. Similarly, the failure of the petitioner to comply with Rule 73, Title 28 U.S.C., and Rule 14 of the United States Court of Appeals for the Second Circuit, does not constitute a matter of general significance. The excuse offered that after judgment was entered against the petitioner by the United States District Court, the petitioner proceeded to vacation in Puerto Rico does not establish that the delay was due to causes beyond his control nor does it constitute a matter of general importance. The fact that the petitioner personally had been a lawyer who specialized in the trial of personal injury actions for a number of years does not constitute an excuse for his failure to comply with the foregoing rules, nor does it establish that such failure was due to causes beyond his control, nor does it constitute a matter of general significance. The fact that the petitioner and his

experienced trial attorney did not retain an additional attorney to collaborate in his appeal until some 2 months after judgment had been entered against the petitioner, does not excuse his failure to comply with the foregoing Rules, nor does it constitute a cause beyond his control, nor does it constitute a matter of general importance.

From the foregoing, it is respectfully submitted that the petitioner has failed to demonstrate that it is important for the United States Supreme Court to invoke its jurisdiction to review this matter and it is respectfully prayed that the Petition for Writ of Certiorari be denied.

POINT II

The petitioner has failed to demonstrate that the United States Court of Appeals for the Second Circuit abused the discretion conferred upon it by Rule 73 of the Federal Rules of Civil Procedure, Title 28 U.S.C. and Section 2071, Title 28 U.S.C. in dismissing the petitioner's appeal for failure to file the record and docket his appeal as required by both Rule 73, Title 28 U.S.C. and Rule 14 of the Rules of the Court of Appeals for the Second Circuit, 28 U.S.C.

1. The petitioner has failed to demonstrate that the United States Court of Appeals for the Second Circuit abused its discretion in determining that the petitioner's trip to Puerto Rico and his delay in retaining an additional attorney to collaborate on his appeal some two months after judgment was entered against him did not constitute causes beyond his control and hence did not establish justifiable excuse for the petitioner's failure to comply with the foregoing Rules. That the petitioner was personally in Puerto Rico and did not order the minutes of the trial from the court reporter until March 17, 1967, does not constitute a justifiable excuse for failure to comply with Rule 73 of the Federal Rules of Civil Procedure,

Title 28 U.S.C. and Rule 14 of the Rules of the Court of Appeals for the Second Circuit, Title 28 U.S.C. It would seem that it cannot be well contended that because a litigant decides to vacation in the islands that would operate to suspend the Rules of the Federal Rules of Procedure and the Rules of the United States Court of Appeals for the Second Circuit. This is particularly true where the petitioner himself had been an attorney specializing in trial work and where the communications between Puerto Rico and New York City are excellent.

Moreover, that an additional attorney was retained to collaborate with the attorney of record on February 21, 1967, was not beyond the control of the petitioner. Not only was the petitioner himself a member of the bar specializing in accident cases for a number of years, but the attorney of record who tried the case was an experienced attorney. The fact that a third attorney was retained to collaborate some two months after judgment was entered, is no sound reason for tolling the operations of the Federal Rules of Civil Procedure and the Rules of the Court of Appeals for the Second Circuit. Otherwise, the said Rules could be circumvented merely by retaining additional counsel. In addition, there has been no justifiable excuse advanced for the failure of the petitioner personally and his attorney of record who tried the case to comply with the aforesaid rules during the two months prior to the retaining of additional counsel.

Thus it was, that both the moving papers and the oral argument on behalf of the petitioner failed to establish that his failure to comply with both the Federal Rules of Civil Procedure and the Rules of the Court of Appeals for the Second Circuit was "due to causes beyond the control of the moving party."

2. The petitioner has failed to demonstrate that the United States Court of Appeals for the Second Circuit abused its discretion in determining that cross-examina-

tion of the petitioner on a collateral matter did not constitute any substantial ground that would make his appeal meritorious. The sole ground upon which the petitioner endeavored to rest his claim that there was a substantial ground that would make his appeal meritorious was the allegation that the Trial Court erred in permitting the cross-examination of the petitioner in respect to the latters criminal convictions. That contention overlooks the terms of Section 4513 of the New York Civil Practice Law and Rules which expressly provide that the conviction of a crime may be shown for the purpose of affecting the weight of a witness' testimony and that the witness "shall be required to answer any relevant question" as to the conviction. Moreover, the party cross-examining is not concluded by the witness' answer.

> "Section 4513. Competency of person convicted of crime.
>
> A person who has been convicted of a crime is a competent witness; but the conviction may be proved; for the purpose of affecting the weight of his testimony, either by cross-examination, upon which he shall be required to answer any relevant question, or by the record. The party cross-examining is not concluded by such person's answer."

This has long been the law in this jurisdiction and the above quoted section of the law is the same as the former Section 350 of the Civil Practice Act with a few minor language changes. This was recognized by the Appellate Division-First Department of the Supreme Court of the State of New York in *Cooke* v. *Glassheim*, 207 A. D. 592, 202 N.Y.S. 599. In that case, the Court held:

> "By Section 350 of the Civil Practice Act it is provided that: 'A person who has been convicted of a crime is, notwithstanding, a competent witness * * *; but the conviction may be proved, for the purpose of affecting weight of his testimony, either by the rec-

ord, or by his cross-examination, upon which he must answer any question relevant to that inquiry; and the party cross-examining him is not concluded, by his answer to such a question.' The criticism of the defendant's attorney was, therefore, unjustified, as he was clearly acting within his rights."

At common law, a person convicted of a crime was disqualified from testifying and when the said disqualification was removed by statute, it was provided that such a person was made competent to testify but with the limitation that his conviction of a crime might be proved for the purpose of affecting the weight of his testimony.

It has been expressly held by the New York Court of Appeals in the case of *Moore* v. *Leventhal,* 303 N. Y. 534, that the admission by a witness under cross-examination, that he has been convicted of a crime does not deprive the cross-examiner of the right to ask further relevant questions as to the conviction.

"We do not think an admission by a witness under cross-examination that he has been convicted of a crime serves to deprive the cross-examiner of the right to show the conviction. The scope of such inquiry, as defined by section 350 of the Civil Practice Act, is not so limited: 'A person who has been convicted of a crime is, notwithstanding, a competent witness in an action or special proceeding; but the conviction may be proved, for the purpose of affecting the weight of his testimony, either by the record, or by his cross-examination, upon which he must answer any question relevant to that inquiry; and the party cross-examining him is not concluded by his answer to such a question.'"

The foregoing New York Rule and decisions apply with particular force where the petitioner's trial attorney brought out on direct examination that the petitioner had

been convicted of a crime and opened the door to cross-examination as to the nature of the crimes of which the petitioner was convicted. On cross-examination when the petitioner's testimony was vague and indefinite as to the convictions, certified copies of the convictions were placed in evidence.

Furthermore, it cannot be seriously denied that all questions as to the credibility of the witnesses were for the trier of the fact and that the determination of the Trial Court who personally observed the respective witnesses and examined the many exhibits should not be disturbed.

Therefore, it is respectfully submitted that the petitioner failed to establish any substantial ground that would make his appeal meritorious.

CONCLUSION

It is respectfully submitted that the petitioner has failed to demonstrate that it is important for the United States Supreme Court to invoke its jurisdiction to review this matter and the petitioner has failed to demonstrate that the United States Court of Appeals for the Second Circuit has abused its discretion in dismissing the petitioner's appeal and it is respectfully prayed that the petition for writ of certiorari be denied.

Respectfully submitted,

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